

Supreme Court, U. S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1977

No. 77-1034

NICOLAS NOGUERAS, JR., FRANK RODRIGUEZ GARCIA,
MERCEDES TORRES DE PEREZ, EDWIN RAMOS YORDAN,
JOSE M. RAMOS BARROSO, CALIXTO CALERO JUARBE,
HIPOLITO MARCANO, JOSE MARIANO RIOS RUIZ, and
JUAN RIVERA ORTIZ,

Petitioners

v.

PUERTO RICO INTERNATIONAL AIRLINES, INC., JAMES A.
CERESA, RAFAEL COLON and JORGE DEL VALLE,

Respondents

**BRIEF IN OPPOSITION TO PETITION FOR A WRIT
OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIRST CIRCUIT**

RAFAEL PEREZ-BACHS AND
RADAMES A. TORRUELLA OF
McCONNELL VALDES KELLEY SIFRE
GRIGGS & RUIZ-SURIA

Counsel for Respondents

G. P. O. Box 4225

San Juan, Puerto Rico 00936

Telephone: (809) 753-3000

753-3004

753-3006

INDEX

	Page
REASONS FOR REFUSING TO ISSUE A WRIT OF CERTIORARI	
I. JURISDICTION	1
II. AN ACTUAL CASE AND CONTROVERSY	2
III. ELEVENTH AMENDMENT IMMUNITY	13
IV. CONCLUSION	17
CASES:	
<i>Butler v. Dexter</i> , 425 U.S. 262, 96 S. Ct. 1427, 47 L. Ed. 2d 774 (1976)	16
<i>Costello v. Wainwright</i> 430 U.S. 325 (1977)	16
<i>Doran v. Salem Inn, Inc.</i> 422 U.S. 922, 95 S. Ct. 2561, 45 L. Ed. 2d 648 (1975)	15
<i>Ellis v. Dyson</i> 421 U.S. 426, 95 S. Ct. 1691, 44 L. Ed. 2d 274 (1975)	15
<i>Hicks v. Miranda</i> 422 U.S. 332, 95 S. Ct. 2281, 45 L. Ed. 2d 223 (1975)	15
<i>Huffman v. Pursue, Ltd.</i> 420 U.S. 592, 95 S. Ct. 1200, 43 L. Ed. 2d 482, reh. den. 421 U.S. 971, 95 S. Ct. 1969, 44 L. Ed. 2d 463 (1975)	15
<i>Kilbourn v. Thompson</i> 103 U.S. 168, 26 L. Ed. 377 (1881)	16
<i>Liberty Mutual Insurance Co. v. Wetzel</i> 424 U.S. 737, 96 S. Ct. 1202, 47 L. Ed. 2d 435 (1976)	1
<i>María Santiago v. C.R.U.V.</i> 554 F. 2d 1210 (1st Cir. 1977)	13
<i>Morales v. Turman</i> 430 U.S. 322 (1977)	16
<i>U.S. v. Craig</i> 528 F. 2d 773 (7th Cir. 1976)	13
<i>Younger v. Harris</i> 401 U.S. 37, 91 S. Ct. 746, 27 L. Ed. 2d 669 (1971)	15

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**REASONS FOR REFUSING TO ISSUE A
WRIT OF CERTIORARI**

I. JURISDICTION

This Court lacks jurisdiction to entertain the petition for certiorari because the order sought to be reviewed, that of the U.S. Court of Appeals for the First Circuit of November 11, 1977, (Appendix I to petition, pp. 1a-2a) does not constitute a final judgment, *Liberty Mutual Insurance Co. v. Wetzel*, 424 U.S. 737, 96 S. Ct. 1202, 47 L. Ed. 2d 435 (1976).

II. AN ACTUAL CASE AND CONTROVERSY

In their petition, defendants have ignored pars. 13, 16 and 17 of the complaint (Appendix III to petition, pp. 10a-12a), from which more than a mere "possible or conjectural controversy" arises.

Defendants seem to argue, at page 6 of their petition, that there will not be an actual case or controversy unless and until, or "if and when questions are posed to them (plaintiffs) requiring disclosure of matters involved in their collective bargaining," and that the complaint is predicated on a "possibility". Defendants further argue that "plaintiffs (sic) conjectures of the possibility of such questions being asked and the possible overruling of their objections thereto by the Commission" do not present a "genuine and present controversy required for a federally cognizable case".

The argument is based on a false premise because the questions *were actually asked* by defendants and *were actually objected* by plaintiffs. Thus, "at the time the complaint was filed, the only matter pending before the Commission was" *much more than* "the subpoenaing of plaintiffs to appear before the Commission and testify" (petition, p. 7).

Without attempting to be exhaustive, the following transpired at the hearings held on October 6 and 21, 1977, that is, *before* the filing of the complaint herein on October 25, 1977. Plaintiffs refer to what *actually* happened so as to correct the inaccuracies and omissions in defendants' version (Supreme Court Rule 40.3).

A. At the October 6, 1977 hearing, the following¹ transpired between co-defendant Nogueras, Jr., and

¹ Portions of said hearing, translated by the undersigned.

Fernando Ruiz-Suria, Esq., one of counsel for plaintiffs:

A. (By Mr. Ruiz-Suria): There is an additional reason today, that is that we have serious doubts that most of the matters described in the subpoena fall within the jurisdiction of this Honorable Commission and we reserve the right to question it in the event that . . .

Q. (By co-defendant Nogueras, Jr.): Which of those matters, colleague?

A. There are matters, for example . . .

Q. Which?

A. For example, matters relating to the offers and demands in the negotiations. Matters relating to . . . , and I am only giving you a sample, not a complete list, matters relating to the economic situation of the company and the reasons for same. Matters regarding the contents of the subpoena and which includes each and every other matter which directly or indirectly, which is what the Americans refer to as a "catch-all", in which any subject matter may fall. Furthermore, there are even matters which, if necessary, we would have to raise regarding the legal validity of the subpoenas served.

* * *

Q. No, but the question is whether my colleague claims that his clients claim that that is beyond the jurisdiction of this Commission.

A. Yes, in the manner in which it is stated.

Q. Right, but these phrases, "the present state of the collective bargaining negotiations of said company", is this or is this not within the jurisdiction, as my colleague says, of this Commission?

A. I have serious doubts.

Q. Regarding offers and demands made, my colleague has already stated that it is beyond the jurisdiction?

A. Definitely.

Q. And regarding the economic situation of said company and the reasons therefor, is it the same?

A. Likewise.

* * *

B. At the October 21, 1977 hearing, the following transpired among co-defendant Nogueras, Jr. and Messrs. Néstor Durán, one of counsel for plaintiffs, co-plaintiffs Colón and co-plaintiff Ceresa:

MR. DURAN: We believe that the task before this Commission goes beyond a legitimate legislative interest when it specifically deals with collective bargaining negotiations which are presently under way in this entity. To the extent this investigation or study enters that area, said state of affairs of the negotiations, to that extent, we believe that the law favors our client in the sense that the study or investigation constitutes an interference with said collective bargaining negotiations.

* * *

MR. NOGUERAS, JR.: Before stating our position in that respect, we want to indicate to our colleague for the record, our colleague has this Commission's subpoena with him. So that I may understand the jurisdictional issue that our colleague raises. Our colleague objects to this Commission's jurisdiction regarding the investigation and study of the labor-management relations of the airline known as PRINAIR. Does he not?

MR. DURAN: That is correct.

* Portions of said hearing, translated by the undersigned.

MR. NOGUERAS, JR.: He also objects to the references made to the status of the collective bargaining negotiations of said company, offers and demands made.

MR. DURAN: That is correct.

MR. NOGUERAS, JR.: The economic situation of said company and the reasons therefor.

MR. DURAN: That is correct.

MR. NOGUERAS, JR.: Salaries and working conditions of the employees.

MR. DURAN: That is correct.

* * *

MR. NOGUERAS, JR.: Then our colleague states that he also objects to the issue of salaries and working conditions of the employees.

MR. DURAN: Our position is that in its entirety, taken as a whole, the matter under discussion before this Commission, we respectfully believe goes beyond a legitimate legislative interest as a whole.

* * *

Q. (By co-defendant Nogueras, Jr.): I want to ask Mr. Colón whether he will furnish to this Commission, within the period of time fixed hereby of ten days, the information requested regarding the location of the PRINAIR aircraft.

MR. COLON: I respectfully decline to answer your question at this time on the advice of my attorneys, since there are two criminal charges pending against me with respect to subpoenas to appear before this Hon. Commission. I believe that the subject matter to which my objection is raised does not fall within the jurisdiction of this Hon. Commission.

* * *

MR. NOGUERAS, JR.: Mr. Colón, what are the total liabilities if PRINAIR?

MR. COLON: Sir, I respectfully decline to answer that question for the reason aforementioned.

MR. NOGUERAS, JR.: What do you mean, aforementioned?

MR. COLON: For the aforementioned reason that, on the advice of my attorney, since there are two criminal charges pending against me regarding subpoenas to appear before this Hon. Commission, which could incriminate me, and furthermore because I believe the subject matter does not fall within the jurisdiction of this Hon. Commission.

* * *

MR. NOGUERAS, JR.: How many PRINAIR pilots are on strike?

MR. COLON: One hundred eighteen.

MR. NOGUERAS, JR.: One hundred eighteen. And were there any other lay-offs of personnel other than PRINAIR pilots during the last few weeks?

MR. COLON: Yes, sir.

MR. NOGUERAS, JR.: How many were laid off?

MR. COLON: Sir, that question falls within the same category aforementioned.

* * *

MR. NOGUERAS, JR.: You were mistaken. Well, if you, that is, you were instructed to answer and you did not answer the question. If you were given ten days within which to obtain specific information regarding the contracts, could you furnish said information and copy of those contracts to this Commission?

MR. COLON: I believe that does not fall within the jurisdiction of this Hon. Commission.

* * *

Q. Witness, what are the total liabilities and accounts payable to date of Prinair, approximately?

A. I again object to the question because of jurisdiction. That is, rather, on the advice of an attorney, I decline to answer.

Q. You decline to answer, on what basis?

A. On the basis of jurisdiction.

Q. On the basis of jurisdiction. Witness, what is the total amount of assets, the amount of money that represents the assets of Prinair to date, as of the most recent date to your knowledge?

A. I emphasize the aforementioned.

Q. Regarding what?

A. Jurisdiction.

Q. Witness, in the last six months, in the last year, we correct, has Prinair made any loans to its parent corporation or to any of its shareholders in amounts exceeding ten thousand dollars?

A. I sustain my position regarding jurisdiction as aforementioned with respect to this question.

Q. Without mentioning any amounts, we ask you whether there have been any such loans.

A. I sustain my position as aforementioned.

Q. Witness, are there any judicial or extrajudicial claims pending against Prinair which may affect its assets?

A. I sustain the same position.

Q. Witness, do you have knowledge of any wage claim pending before the Superior Court, San Juan Part against Prinair?

A. Yes, sir.

Q. You do have knowledge. For accounting purposes, when a claim of that nature is pending, do you establish any reserve for what is known as a "contingent liability"?

A. I again emphasize my position as aforementioned regarding the question of jurisdiction.

* * *

Q. Mr. Ceresa, are you presently thinking of moving Prinair's operations outside of Puerto Rico?

MR. CERESA: Honorable Commission, the matter covered by your question I believe falls beyond the jurisdiction of the Honorable Commission, I request your approval of my retraction at this time.

Q. Since the witness has just requested the approval of this Commission for declining to answer, the request is denied and he is instructed to answer.

A. Honorable Commission, the matter covered by your question I believe falls beyond the jurisdiction of the Honorable Commission.

Q. Mr. Ceresa, what are the salaries paid to Prinair pilots and co-pilots?

A. Honorable Commission, the matter covered by your question I believe falls beyond the jurisdiction of the Honorable Commission.

* * *

Q. Mr. Ceresa, how many days of vacation were the striking Prinair pilots entitled to up to the time of the strike?

A. Honorable Commission, I refrain from answering due to the reasons stated above regarding jurisdiction.

Q. Mr. Ceresa, how many days of sick leave were the Prinair pilots entitled to up to the time of the strike?

A. Honorable Commission, I refrain from answering because of these reasons of jurisdiction.

Q. Mr. Ceresa, what is the present status of the collective bargaining negotiations between the Company and the pilots union?

A. Honorable Commission, I again refer to my previous answer regarding jurisdiction.

Q. Mr. Ceresa, have you personally, or through other representatives of Prinair, contracted pilots and copilots to perform the services previously performed by the striking Prinair pilots?

A. Honorable Commission, again I refrain from answering due to the reasons aforesaid regarding jurisdiction.

Q. Mr. Ceresa, I ask you, do you have any knowledge of the fact that Prinair intends to bring or will bring to Puerto Rico personnel to fly its aircraft, which personnel has been contracted or will be contracted outside of Puerto Rico?

* * *

MR. PRESIDENT (codefendant Noguerras, Jr.): Let us ask the same question again from different angles so that you may answer.

Mr. Ceresa, do you have any knowledge of pilots or copilots who have been contracted by Prinair to perform the flights normally performed by the striking pilots?

A. Honorable Commission, at this time I respectfully decline to answer this question inasmuch as I am personally under criminal charges directly related to subpoenas for me to appear

before this Honorable Commission. On the same matters covered by your question and upon advice of my Counsellor I must decline at this time to answer as I could incriminate myself. Furthermore the matter covered by your question, I believe, falls beyond the jurisdiction of this Honorable Commission.

* * *

Q. And the payments made to date regarding said guards or security agents. Mr. Ceresa, is there scheduled, or pending to be held, a meeting to collectively negotiate with the pilots' union which you represent? The pilots' union representing your employees, that is.

A. Honorable Commission, the matter covered by your question I believe falls beyond the jurisdiction of this Honorable Commission.

Q. Mr. Ceresa, is there scheduled any meeting before any federal officer, or any agency or entity . . .

MR. DURAN: Federal?

Q. Federal . . . pursuant to the provisions of the Railway Labor Act or any other applicable statute to deal with, in any form or manner, through arbitration, mediation, conciliation, or any other mechanism, the labor-management conflict or the collective bargaining negotiations between the pilots' union of Prinair and Prinair?

A. Honorable Commission, again I must state the matter covered by your question, I believe falls beyond the jurisdiction of this Honorable Commission at this time.

Q. What are the total liabilities of Prinair to date?

A. Honorable Commission, again at this time, the matter covered by your question, I believe, falls

beyond the jurisdiction of this Honorable Commission.

Q. Witness, what are the total assets of Prinair Corporation to date? That is, the amount of money constituting assets of Prinair to date?

A. Honorable Commission, at this time it is my opinion that the matter covered by your question falls beyond the jurisdiction of this Honorable Commission.

Q. Mr. Ceresa, is there pending any wage claim against Prinair filed by its pilots in the Superior Court of San Juan or any other court?

A. Honorable Commission, at this time the matter covered by your question, I believe, falls beyond the jurisdiction of this Honorable Commission.

Q. For the record, the witness has been instructed, and is instructed, to answer.

A. A claim has been filed, to the best of my knowledge.

Q. Excuse me?

A. A wage claim has been filed.

Q. Has been filed? What is the status of said wage claim?

A. Honorable Commission, the matter covered by your question, I believe, falls beyond the jurisdiction of this Honorable Commission.

Q. Mr. Ceresa, how many passengers patronize Prinair flights annually?

A. Honorable Commission, it averages between 750,000 to 850,000 during the last five years.

Q. When you say during the last five years, how much is that annually?

A. Approximations, Senator, would be: in 1972, 800,000; in 1973, 700,000; in 1974, 800,000; in

1975, 880,000; in 1976, 845,000. These are approximations.

Q. Taking the last year, what volume of income does this represent?

A. Honorable Commission, the matter covered by your question, I believe, falls beyond the jurisdiction of this Honorable Commission.

Q. Mr. Ceresa, what is the last offer made by the company at the bargaining table to the pilots' union? At the collective bargaining negotiations?

A. Honorable Commission, at this time the matter covered by your question, I believe, falls beyond the jurisdiction of this Honorable Commission.

Q. You are instructed to answer.

A. Honorable Commission, the matter covered by your question, I believe, falls beyond the jurisdiction of this Honorable Commission.

* * *

Q. Mr. Ceresa, is there any person in Puerto Rico who has been contracted to perform the services previously rendered by the striking pilots?

A. Honorable Commission, the matter covered by your question at this time, I believe, falls beyond the jurisdiction of this Honorable Commission.

Q. Mr. Ceresa, has Prinair placed an advertisement in the newspaper media of Puerto Rico requesting personnel to perform the services previously rendered by the striking Prinair pilots?

A. Honorable Commission, the matter covered by your question at this time, I believe, falls be-

yond the jurisdiction of this Honorable Commission.

* * *

III. ELEVENTH AMENDMENT IMMUNITY

The concurring opinion of Circuit Judge Tone in *U.S. v. Craig*, 528 F.2d 773 at 782 (7th Cir. 1976)³ states in part:

"The common law immunity of state legislators has not been held to be coextensive with that which members of Congress enjoy under the federal speech or debate clause. Even with respect to civil liability, speech-or-debate immunity is broader than official immunity. The former bars injunction actions directed at legislative activities of Congress. E.g., *Estland v. United States Servicemen's Fund*, 421 U.S. 491, 95 S.Ct. 1813, 44 L. Ed. 2d 491 (1969). The doctrine of official immunity, on the other hand, has been held by one court not to bar injunctive relief against state legislative activities which offend federal law, *Jordan v. Hutcheson*, 323 F. 2d 597 (4th Cir. 1963), and in other cases federal injunctions against state legislative action have been sustained without discussion of the question of immunity. E.g., *Bond v. Floyd*, 385 U.S. 116, 87 S. Ct. 339, 17 L. Ed. 235 (1966); *Bush v. Orleans Parish School Board*, 191 F. Supp. 871 (E.D. La.), aff'd sub nom. *Denny v. Bush*, 367 U.S. 908, 81 S. Ct. 1917, 6 L.Ed. 2d 1249 (1961)."

This case does not present a genuine XI Amendment issue because *only* injunctive relief, and no money damages, is sought by plaintiffs, *Maria Santiago v. C.R. U.V.* 554 F. 2d 1210 at 1212-1213 (1st Cir. 1977):

³ Defendants rely on this case at p. 10 of their petition.

"Where only injunctive relief is at issue, it may seem odd to separate a government's immunity from that of its officers. After all, it might be argued, someone suing a government officer in his official capacity is 'really' suing the government. Putting the question this way, however, obscures the balancing of interests that characterizes this area of the law. Sovereign immunity is a limit on the courts' ability to interfere in the functioning of government, but it is limited in turn by the deep-seated belief that not even government may flout the law. This tension has been resolved by a fiction—an officer disobeying the law may be enjoined even when his government may not. *Ex parte Young*, 209 U.S. 123, 28 S. Ct. 441, 52 L. Ed. 714 (1908). Although the courts have sometimes strayed from a frank recognition of this fiction as an expression of underlying principles, the principles have been strongly reaffirmed of late. In dealing with state immunity from suit, the Supreme Court has substituted a simple rule for more metaphysical inquiries into when a suit against an officer is 'really' a suit against the state. When state officers are sued, the Court held, federal courts may grant prospective but not retrospective relief. *Edelman v. Jordan*, 415 U.S. 651, 94 S. Ct. 1347, 39 L. Ed. 2d 662 (1974). The line drawn by the Court represents a compromise between the impulse to preserve state autonomy and the need to enforce federal law. Injunctions are necessary to assure the supremacy of national law; damage awards are not. Like considerations led Congress to draw a similar line in suits against the federal government; it has clarified the murky area of federal sovereign immunity by permitting injunctive actions directly against the government. Pub. L. 94-574 (1976) (amending 5 U.S.C. §§ 702-03).

"We think that the same tension which shaped federal sovereign immunity and eleventh amendment doctrine is shaping the immunity bestowed

by *Monroe v. Pape*, 365 U.S. 167, 81 S. Ct. 473, 5 L. Ed. 2d 492 (1961). Although the Supreme Court has not ruled, the circuit decisions are falling into a pattern very like the one that governs eleventh amendment cases: while many government entities are immune from suit under § 1983, their officials, even when sued in an official capacity, do not share the immunity, at least when only injunctive relief is sought . . ."

Insofar as defendants claim, at pp. 7-8 of their petition, that "plaintiff's resistance to the Commission's subpoenas and the subsequent efforts of the latter to enforce said subpoenas by legal proceedings . . . are matters of state law that, under the facts of this case, are not open to interference by the Federal Judicial power", citing *Younger v. Harris*, 401 U.S. 37, 91 S. Ct. 746, 27 L. Ed. 2d 669 (1971) and *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 95 S. Ct. 1200, 43 L. Ed. 2d 482, reh. den. 421 U.S. 971, 95 S. Ct. 1969, 44 L. Ed. 463 (1975), suffice it to say that no injunctive relief against ongoing criminal proceedings (*Younger*) or civil but quasi-criminal proceedings (*Huffman*) has been sought herein and furthermore, all criminal charges against plaintiffs "were later withdrawn" (Appendix V to petition, p. 20a, par. 14). No state proceeding being pending, criminal or otherwise, the *Younger-Huffman* doctrine is simply inapplicable herein. Compare *Hicks v. Miranda*, 422 U.S. 332, 95 S. Ct. 2281, 45 L. Ed. 2d 223 (1975) with *Ellis v. Dyson*, 421 U.S. 426, 95 S. Ct. 1691, 44 L. Ed. 2d 274 (1975) and *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 95 S. Ct. 2561, 45 L. Ed. 2d 648 (1975).

Defendants seem to argue, at p. 9 of their petition, that a challenge to the constitutionality of a statute sought to be enforced is indispensable herein, as if this

case presented an issue under the now repealed three-judge court legislation. Such a challenge is not present herein (only defendants' *actions* are being challenged) and it is not indispensable. Cf. *Butler v. Dexter*, 425 U.S. 262, 96 S. Ct. 1427, 47 L. Ed. 2d 774 (1976); *Morales v. Turman*, 430 U.S. 322 (1977); *Costello v. Wainwright*, 430 U.S. 325 (1977).

Under the guise of the XI Amendment, defendants would like to be *the* final judges of their own powers and privileges in cases in which the federal rights and liberties of United States citizens are concerned and they would *never* have the legality of their actions examined and determined by *any* court. The law is otherwise, *Kilbourn v. Thompson*, 103 U.S. 168 at 199 (1881):

"The House of Representatives (says the court) is not the final judge of its own power and privileges in cases in which the rights and liberties of the subject are concerned, but the legality of its action may be examined and determined by this court. That House is not the Legislature, but only a part of it, and is therefore subject in its action to the law in common with all other bodies, officers and tribunals within the Commonwealth. Especially is it competent and proper for this court to consider whether its proceedings are in conformity with the Constitution and laws, because living under a written Constitution, no branch or department of the government is supreme, and it is the province and duty of the judicial department to determine in cases regularly brought before them, whether the powers of any branch of the government, and even those of the Legislature in the enactment of laws, have been exercised in conformity to the Constitution; and if they have not, to treat their acts as null and void . . ."

IV. CONCLUSION

The petition for certiorari does not present special and important reasons for review (Supreme Court Rue 19) and it should be denied, as it is hereby very respectfully requested.

Respectfully submitted.

RAFAEL PEREZ-BACHS AND
RADAMES A. TORRUELLA OF
McCONNELL VALDES KELLEY SIFRE
GRIGGS & RUIZ-SURIA
Counsel for Plaintiffs, Respondents
G. P. O. Box 4225
San Juan, Puerto Rico 00936
Telephone: (809) 753-3000
753-3004
753-3006